Supreme Court, U.S.
FILED
JUL 1 - 2010
OFFICE OF THE CLERK

No. 09-1449

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNEER JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Petitioners,

v.

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOHN E. HIGGINS
NIXON PEABODY LLP
677 Broadway, 10th Floor
Albany, NY 12207
jehiggins@nixonpeabody.com
(518) 427-2650

MARGARET A. CLEMENS
Counsel of Record
LITTLER MENDELSON, P.C.
400 Linden Oaks
Suite 110
Rochester, NY 14625
mclemens@littler.com
(585) 203-3400

Counsel for Respondents

230821

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Respondents object to the question presented by petitioners because it is the wrong question. Petitioners' claim that the Second Circuit's Summary Order misconstrued this Court's mandate in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395 (2008) ("*Meacham*") on the issue of a purported waiver of the "reasonable factors other than age" ("RFOA") defense is entirely without merit. This Court was squarely presented with the issue of waiver in *Meacham* and by necessary implication rejected it.

Thus, the Court of Appeals decision on the waiver issue and its vacating of the District Court's decision reinstating the judgment in favor of petitioners on their disparate impact age discrimination claims does not warrant a grant of the petition on the question presented by petitioners.

However, for reasons set forth in respondents' separately-filed Conditional Cross-Petition, the questions as to which this Court should grant certiorari and reverse the Second Circuit concern the only issue left open in *Meacham*. This issue, which the Court of Appeals declined to answer, but which this Court can and should resolve on the existing trial record, as a matter of law, is, whether respondents satisfied their burden of persuasion on the RFOA defense.

STATEMENT PURSUANT TO RULE 29.6

Knoll's parent corporation is Lockheed Martin Corporation, which owns 100% of Knoll's stock. The publicly traded companies who own approximately 10% or more of Lockheed Martin Corporation's stock, as reported on Schedule 13G filed in February 12, 2010, pursuant to Section 16(a) of the Securities Exchange Act of 1934, is:

State Street Corporation	20%

Lockheed Martin Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
PRELIMINARY STATEMENT	1
COUNTER STATEMENT OF THE CASE	3
Factual Background	3
Procedural Background	4
A. The Trial	5
B. Post-Trial Motions	9
C. The First Appeal and Petition to this Court (2004-2005)	9
D. The Decision on Remand and the Second Petition to this Court (2007)	10
E. The Decisions following Remand (2008-2009)	11
F. The Second Appeal (2009)	11

Contents

Page

REASONS FOR DENYING THE PETITION ... 12

POINT I

THE LIMITED SCOPE OF THIS COURT'S MANDATE PRECLUDED RECONSIDERATION OF THE ISSUE OF WAIVER 12

POINT II

KNOLLS DID NOT WAIVE OR ABANDON THEIR RFOA DEFENSE .. 19

A. Knolls Acted in Accordance with Existing Legal Precedent 20

B. The Court Improperly Elevated Form Over Substance 25

C. The Court Erroneously Overlooked the Substance of the Proof Offered at Trial ... 26

D. The Lower Court Mischaracterized Knolls' Evidence 29

POINT III

ANY PURPORTED WAIVER SHOULD HAVE BEEN EXCUSED 32

CONCLUSION 33

TABLE OF CITED AUTHORITIES

Page

CASES

Aladdin's Castle, Inc. v. Mesquite,
713 F.2d 137 (5th Cir. 1983) 14

Allegheny Corp. v. Breswick & Co. ("*Breswick*"),
355 U.S. 415 (1958) 17

Bennett v. City of Holyoke,
362 F.3d 1 (1st Cir. 2004) 30

Blonder-Tongue Lab. v. University of Illinois Found.,
402 U.S. 313 (1971), *cert. denied*,
409 U.S. 1061 (1972) 27

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 23

Curtis Pub. Co. v. Butts,
388 U.S. 130 (1967), *cert. denied*,
391 U.S. 966 (1968) 20, 24, 30

Donovan v. Milk Mktg., Inc.,
243 F.3d 584 (2d Cir. 2001) 24

EEOC v. Dinuba Med. Clinic,
222 F.3d 580 (9th Cir. 2000) 23

Escalera v. Coombe,
852 F.2d 45 (2d Cir. 1988) 14

Cited Authorities

Page

Federal Election Commission v. Legi-Tech, Inc.,
75 F.3d 704 (D.C. Cir.) 30

Federal Trade Com. v. Standard Education Soc.,
148 F.2d 931 (2d Cir. 1945) 14

Geller v. Markham,
635 F.2d 1027 (2d Cir. 1980), *cert. denied*,
451 U.S. 945 (1981) 21, 22

Holland v. Big River Minerals Corp.,
181 F.3d 597 (4th Cir. 1999), *cert. denied*,
528 U.S. 1117 (2000) 31

Holzsager v. Valley Hospital,
646 F.2d 792 (2d Cir. 1981) 20, 23, 30

Hormel v. Helvering,
312 U.S. 552 (1941) 20

Hyatt v. Heckler,
807 F.2d 376 (4th Cir. 1986),
cert. denied, 484 U.S. 820 (1987) 14

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 12-13

Johnson v. Zerbst,
304 U.S. 458 (1938) 20

KAPL, Inc. v. Meacham,
544 U.S. 957 (2005) 10

Cited Authorities

Page

Kotler v. American Tobacco Co.,
981 F.2d 7 (1st Cir. 1992) 14

Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.,
964 F.2d 106 (2d Cir. 1992) 21, 22

Meacham v. Knolls Atomic Power Lab.,
381 F.3d 56 (2d Cir. 2004) 4, 8, 9, 10

Meacham v. Knolls Atomic Power Lab.,
461 F.3d 134 (2d Cir. 2006) ..... *passim*

Meacham v. Knolls Atomic Power Lab.,
554 U.S. 84, 128 S. Ct. 2395 (2008)
("*Meacham*") ..... *passim*

Meacham v. Knolls Atomic Power Lab.,
305 Fed. Appx. 748 (2d Cir. 2009) 11

Meacham v. Knolls Atomic Power Lab.,
627 F. Supp. 2d 72 (N.D.N.Y. 2009) 11, 25

Meacham v. Knolls Atomic Power Lab.,
358 Fed. Appx. 233 (2d Cir. 2009) 2, 12

Millowitz v. Citigroup Global Markets, Inc. (In re Salomon Analyst Metromedia Litig.),
544 F.3d 474 (2d Cir. 2008) 32

Cited Authorities

Page

Mutual Life Ins. Co. v. Hill,
193 U.S. 551 (1904) 18

Ohler v. United States,
529 U.S. 753 (2000) 32

Paese v. Hartford Life & Accident Ins. Co.,
449 F.3d 435 (2d Cir. 2006) 31

Pulliam v. Tallapoosa County Jail,
185 F.3d 1182 (11th Cir. 1999) 24

Quern v. Jordan,
440 U.S. 332 (1979) 18

Reed v. Ross,
468 U.S. 1 (1984) 31

Rogers v. McDorman,
521 F.3d 381 (5th Cir. 2008) 24, 25, 27

Rose v. Amsouth Bank,
391 F.3d 63 (2d Cir. 2004) 24

Sibbald v. United States,
37 U.S. 488 (1838) 13

Smith v. City of Jackson,
544 U.S. 228 (2005) ..... *passim*

Cited Authorities

Page

Smith v. Xerox Corp.,
196 F.3d 358 (2d Cir. 1999) 21, 22

Sprague v. Ticonic Nat'l Bank,
307 U.S. 161 (1939) 18

Uebersee Finanz-Korporation, A. G. v. McGrath,
343 U.S. 205 (1952) 20

United States v. Bell,
5 F.3d 64 (4th Cir. 1993) 13

United States v. Ben Zvi,
242 F.3d 89 (2d Cir. 2001) 13, 14

United States v. Broce,
488 U.S. 563 (1989) 32

United States v. Navajo Nation,
___ U.S. ___, 129 S. Ct. 1547 (2009) 17

United States v. Pineiro,
470 F.3d 200 (5th Cir. 2006) 25

United States v. Viola,
35 F.3d 37 (2d Cir. 1994) 23

Unitherm v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 31, 32

Cited Authorities

Page

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989), *cert. denied*,
513 U.S. 809 (1994) 21, 32

Watson v. Ft. Worth Bank & Trust,
487 U.S. 977 (1988) 21

Wiwa v. Royal Dutch Petroleum Co.,
96 Civ. 8386, 2009 U.S. Dist. LEXIS 14883
(S.D.N.Y. Feb. 23, 2009) 24

FEDERAL STATUTES

29 U.S.C. § 621, *et seq.* 4

29 U.S.C. § 623(4)(f)(1) 14

REGULATIONS

29 C.F.R. § 1625.7(d) 21, 25

RULES

Fed. R. Civ. P. 50 ..... 9, 31

Fed. R. Civ. P. 59 9

U.S.C. Rule 29.6 ii

Securities Exchange Act of 1934 Section 16(a) ... ii

Cited Authorities

Page

OTHER

Meacham v. Knolls Atomic Power Lab.,
2006 U.S. Briefs 1505 (U.S. April 14, 2008) . . 2

PRELIMINARY STATEMENT

Respondents Knolls Atomic Power Laboratory, Inc., Lockheed Martin Corporation, and John J. Freeh (collectively referred to in this Brief as "Knolls"), oppose the Petition for a Writ of Certiorari on the question presented because it is the wrong question.

This Court's mandate in *Meacham* was a limited one. As this Court explained, "the only thing at stake in this case . . . is the gap between production and persuasion" and the Second Circuit "showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion." *Meacham*, 128 S. Ct. at 2206-07[1]. Thus, the only question that this Court in *Meacham* remanded to the Second Circuit to decide "in the first instance" is whether the outcome should be any different when the burden of persuasion is properly placed on the employer. *Id.*

Importantly, in vacating the judgment in *Meacham II* and remanding this case back to the Second Circuit to decide this question, the Supreme Court's opinion in *Meacham* did not disturb certain prior findings by the Second Circuit in *Meacham II*. This includes, but is not limited to, the *Meacham II* holding that the proof of reasonableness at trial unquestionably satisfied Knolls' burden of production on the RFOA defense.

---

1. This and subsequent references to *Meacham* are to the Supreme Court Reporter.

Thus, by necessary implication, the *only* issue which could have been properly considered by the Second Circuit on remand was whether Knolls had satisfied its burden of persuasion on its RFOA defense. Accordingly, the Second Circuit properly interpreted this Court's mandate and the opinion in *Meacham* as precluding reconsideration of petitioners' waiver arguments.

Significantly in this regard, as the Second Circuit itself explained in its Summary Order, waiver principles are analytically antecedent to an analysis on the merits. *Meacham v. Knolls Atomic Power Lab.*, 358 Fed. Appx. 233 (2d Cir. 2009). Stated differently, this Court had to reject petitioners' waiver arguments before commencing its analysis of the RFOA burden allocation.

That this Court's mandate and opinion were properly interpreted by the Second Circuit so as to preclude consideration of petitioners' waiver arguments is also supported by the fact that petitioners previously raised the waiver argument before this Court in *Meacham*. Petitioners asked this Court to either find that Knolls waived the defense and order entry of judgment on the jury's verdict, or remand for further proceedings. *Meacham v. Knolls Atomic Power Lab.*, 2006 U.S. Briefs 1505, *23 (U.S. April 14, 2008). In choosing to remand on the very limited question set forth in the *Meacham* opinion, a question that is unmistakably related to the merits of Knolls' RFOA defense, this Court implicitly rejected petitioners' prior request to find that Knolls waived, abandoned and/or forfeited this defense.

Even if this were not the case, this Court should reject petitioners' request to reverse the Second Circuit on the issue of waiver, and to reinstate the verdict and judgment against Knolls on petitioners' disparate impact claim because, among other things, petitioners' waiver argument lacks any factual or legal merit. In fact, as demonstrated by the voluminous record before this Court in *Meacham*, Knolls offered overwhelming and unchallenged RFOA evidence at trial in this case.

Accordingly, even though this Court may correct a lower court's misconstruction of the mandate and opinion in *Meacham*, and should do so in this case with respect to the Second Circuit's failure to answer the burden of persuasion issue in Knolls' favor, the Second Circuit's judgment on the issue of waiver and its vacating of the judgment should be upheld.

COUNTER STATEMENT OF THE CASE

Factual Background

As explained in *Meacham*, Knolls "has a history dating back to the first nuclear-powered submarines in the 1940s and 1950s." *Meacham*, 128 S. Ct. at 2398. As further explained in *Meacham*, however, "[t]he demands for naval nuclear reactors changed with the end of the Cold War, and for fiscal year 1996 Knolls was ordered to reduce its work force." *Id.* "Even after a hundred or so employees chose to take the company's ensuing buyout offer, Knolls was left with thirty-some jobs to cut." *Id.* Petitioners in this case were among the former Knolls employees subsequently laid off in 1996 as part of a required involuntarily reduction-in-force (or "RIF").

To determine which salaried employees should be laid off, Knolls designed an age-neutral matrix for ranking employees based upon their comparative performance, the criticality of their skills, their flexibility or whether or not they could perform more than one job, and their years of company service. *Meacham*, 128 S. Ct. at 2398.

Thirty-one of the salaried employees who ranked lowest on the matrices were identified for layoff. *Id.* Of this number, thirty were over the age of forty. *Id.* Knolls reviewed the reasons supporting each termination and concluded that each of the low rankings was the result of legitimate, non-discriminatory reasons unrelated to the individual's age. *Meacham v. Knolls Atomic Power Lab.*, ("*Meacham I*"), 381 F.3d 56, 64 (2d Cir. 2004). Accordingly, Knolls proceeded in good faith with the RIF and this lawsuit resulted.

Procedural Background

Twenty-eight of the employees terminated from employment in the RIF filed suit under both federal and state laws prohibiting age discrimination, alleging both disparate treatment and disparate impact claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA") and New York State law. Petitioners alleged that Knolls intentionally discriminated against them because of their ages in selecting them for termination from employment during the RIF. Second, they alleged that the same actions which were the basis of their intentional age discrimination claims also had a disparate impact on employees age forty and over. *Meacham*, 128 S. Ct. at 2398.

Following extensive discovery, Knolls moved for summary judgment dismissing the claims in the Complaint in their entirety. The lower court denied the motion, finding that there were genuine issues for trial.

A. The Trial

The case proceeded to a trial before a jury. The liability phase of the trial lasted approximately five weeks, and included testimony from approximately forty-three (43) witnesses (only seven of whom were members of the plaintiff class). Most of the witnesses at trial, whether called by petitioners or by Knolls, were managers with intimate knowledge of the layoff factors at issue and how they were applied to petitioners.

At trial, Knolls produced evidence supporting its several defenses to petitioners' disparate treatment and disparate impact age discrimination claims. This evidence by Knolls included not only the layoff matrices but the testimony of numerous managers, human resources representatives and expert witnesses called by Knolls at trial.

Both the testimonial and documentary evidence offered at trial demonstrated that age was simply not a factor upon which employees where selected for the RIF. Specifically, the evidence demonstrated that, in designing the RIF, managers evaluated and followed the best practices used by other employers, including but not limited to IBM, GE and Ford. (JA-924, JA-1461-1464, JA-1889, JA-1899-1900, JA-1954-1955, JA- 4021.18).[2]

---

2. References to the Joint Appendix previously submitted to the Second Circuit are designated "JA[page number]" but are not reproduced again as an Appendix to this Brief in Opposition.

After benchmarking and studying these best practices, Knolls submitted its own RIF plan to the government for its approval. (JA-1265-1266, JA-1890, JA-1896, JA-4634). The Department of Energy ("DOE"), which funds Knolls' operations together with the U.S. Navy, approved the layoff plan, including the four criteria that Knolls used to select employees for the RIF: performance, criticality, flexibility and company service. (JA-1886, JA-1897-1898, JA-4634).

Knolls' unchallenged proof of reasonableness at trial with respect to these four factors included testimony from an industrial psychologist, Dr. Frank Landy, called as an expert witness. Among other things, Dr. Landy testified that these four layoff criteria were job-related factors which "form the core of most reasonable and effective systems" for making selection decision, adding: "I haven't seen any systems for making personnel decisions in the last couple decades that have not included those four things." (JA-4021.21-4021.25) (emphasis added).

Knolls also offered the testimony of numerous managers and its General Counsel regarding the unavailability of any alternatives to the RIF as well as the several steps Knolls took to ensure that its managers rated employees fairly. For example, before completing the matrices, Knolls managers — who possessed unique knowledge concerning the needs of their sections and the capabilities of their employees — received extensive training on the entire RIF process and how to apply each of the criteria on the matrix. (JA-1557-1558, JA-1600, JA-1679, JA-1962-1967, JA-4021.19--4021.20, JA-4021.29, JA-1576-1577, JA-1596, JA-1966-1967, JA-2682-2683).

According to Dr. Landy, the "training programs that Knolls had developed and delivered for this were really very, very good [—] as good, if not better than any others I had seen for accomplishing the same goal." (JA-4021.19).

In fact, Knolls supplied its managers with a comprehensive written guide which provided definitions of the four criteria and explanations of how they should be applied. *Meacham v. Knolls Atomic Power Lab.*, ("*Meacham II*"), 461 F.3d 134, 144 (2d Cir. 2006); JA-1596, JA-4668-69). Managers assigned job performance scores by averaging the ratings from the employee's prior two performance appraisals.

Additionally, managers scored employees on their "criticality," which was a measure of how essential an employee's skills were to the existing and future work of the Laboratory. *Meacham*, 128 S. Ct. at 2398. *See also* (JA-1596-1597, JA-1702-1703, JA-1956-1957). The managers also scored employees on their "flexibility," which was a measure of whether the employee possessed — or could readily acquire — skills that might be applied in areas of the Laboratory other than the employee's current job. *Meacham*, 128 S. Ct. at 2398. *See also* (JA-1596-1597, JA-1955-1956). Lastly, managers rated employees based on their years of company service, with higher scores given to longer serviced employees. *Meacham*, 128 S. Ct. at 2398. *See also* (JA-4669).

Employees' scores for the four criteria were added together and the employees with the lowest rankings on each matrix were identified for layoff, including petitioners. *Meacham II*, 461 F.3d at 138. *See also* (JA 4672).

Knolls also proved at trial that managers were required to defend their decisions to a Review Board made up of senior managers. (JA-1071-1072, JA-1410-1411, JA-1581-1582, JA-1962, JA-1970, JA-2004-2005, JA-4680-4681). The Review Board closely scrutinized managers' determinations to ensure that their analyses of excess skills and applications of the RIF criteria were consistent and accurate. (JA-1071-1072, JA-1128-1129, JA-1410-1411, JA-1582, JA-1962, JA-3430-3431, JA-3664, JA-3696-3697).

All of this evidence led the Second Circuit to find in *Meacham II*, as a matter of law, that Knolls prevailed in proving its RFOA defense, although the court couched its findings in terms of petitioners' failure to meet their burden of proof on their disparate impact claim. *Meacham II*, 461 F.3d at 144.

At the completion of the trial, the jury rendered a verdict which completely exonerated Knolls from all liability on petitioners' claims of intentional age discrimination under both federal and state law. More specifically, the jury found, as to each of the original twenty-eight plaintiffs, that they *failed to prove* that Knolls was motivated by age in selecting them for termination in the RIF. Nevertheless, the jury found in favor of a sub-group of twenty-six of the original twenty-eight individual plaintiffs on their disparate impact claim. *Meacham I*, 381 F.3d at 67.

B. Post-Trial Motions

Knolls filed timely motions for judgment as a matter of law and for a new trial and remittitur with regard to the disparate impact claims pursuant to Fed. R. Civ. P. 50 and 59. *Id.* Contrary to petitioners' representations to this Court, the post-trial motions raised the RFOA defense, although not in those precise words.

Specifically, Knolls argued that petitioners' adverse impact claims must fail, as a matter of law, because Knolls had "articulate[ed] legitimate non-discriminatory reasons for selecting the plaintiffs for layoff" as well as a legitimate business justification. (JA-660-661). Simply put, Knolls argued the substance of the defense throughout the course of post-trial motions, as they had during the trial of this matter, based on proof that the RIF and its components were based upon legitimate non-age factors.

Although the District Court found that Knolls met its then-applicable burden of production on the issue, the court refused to set aside that portion of the verdict which imposed liability against Knolls under both federal and state law for disparate impact age discrimination. Judgment was entered on March 28, 2002.

C. The First Appeal and Petition to this Court (2004-2005)

Petitioners timely appealed to the United States Court of Appeals for the Second Circuit from the final judgment of the District Court. *Meacham I*, 381 F.3d at 68. The Second Circuit affirmed the judgment of the

District Court and denied a motion for reconsideration *en banc* on October 15, 2004.

This Court vacated the judgment of the United States Court of the Second Circuit in *Meacham I* and remanded it back to that Court for further reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005). *KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005).

D. The Decision on Remand and the Second Petition to this Court (2007)

On remand, the Second Circuit vacated the District Court's judgment and remanded the case with instructions to enter judgment as a matter of law in favor of Knolls and dismiss the case. *Meacham II*, 461 F.3d at 147. In doing so, the Second Circuit found that Knolls had met its burden of production on the RFOA defense and that petitioners had not met their burden of proof on a disparate impact claim. Petitioners filed a petition with this Court seeking a review as to which party bore the burden of proof on the RFOA defense. They additionally contended that Knolls had waived its RFOA defense.

On June 19, 2008 this Court vacated the judgment in *Meacham II* and again remanded the case to the Second Circuit, this time for further proceedings consistent with its opinion in *Meacham*, holding that the Second Circuit improperly applied the burden of persuasion with respect to the "reasonable factors other than age" defense on petitioners. *Meacham*, 128 S. Ct. at 2406-07. In doing so, this Court found that the Second

Circuit had showed no hesitancy in finding that Knolls had met its burden with regard to the RFOA defense (when it was viewed by the Second Circuit as only a burden of production) and that the only remaining issue was whether the proof offered at trial was also sufficient to meet its burden of persuasion.

E. The Decisions following Remand (2008-2009)

Instead of directly deciding whether Knolls met its burden of proving the RFOA defense, the Second Circuit remanded the case to the District Court. *Meacham v. Knolls Atomic Power Lab.*, 305 Fed. Appx. 748 (2d Cir. 2009). The District Court, however, never addressed the issue posed by this Court in its decision and instead, found that Knolls had waived the "reasonable factors other than age" defense because they had not used that precise term of art to describe their defense at trial. The District Court then reinstated the judgment in favor of petitioners. *Meacham v. Knolls Atomic Power Lab.*, 627 F. Supp. 2d 72 (N.D.N.Y. 2009).

F. The Second Appeal (2009)

Knolls timely appealed the District Court's decision. The Second Circuit responded on appeal by correctly vacating the judgment of the District Court, finding that the issue of waiver was outside the scope of the mandate of this Court in *Meacham*. The Second Circuit nevertheless refused to answer the question remanded by this Court, citing – "uncertainty and changes in the governing law" which purportedly complicated the issues in this case to such an extent that the court found itself unable to determine whether Knolls satisfied its

burden of persuasion on the RFOA defense, as a matter of law.

The Second Circuit then remanded the case for a new trial (and additional discovery) on the issue of liability only. *Meacham v. Knolls Atomic Power Lab.*, 358 Fed. Appx. 233, (2d Cir. Dec. 21, 2009).

On January 4, 2010, Knolls timely filed a Petition for Rehearing *En Banc*, which was denied by the Second Circuit on February 23, 2010. On May 24, 2010, petitioners filed a petition for a writ of certiorari, which Knolls opposes for the reasons discussed in detail below.

REASONS FOR DENYING THE PETITION

POINT I

THE LIMITED SCOPE OF THIS COURT'S MANDATE PRECLUDED RECONSIDERATION OF THE ISSUE OF WAIVER

The Petition on the waiver question presented by petitioners should be denied. Petitioners have not demonstrated, as they must, that the Second Circuit Court of Appeals acted beyond the scope of this Court's prior mandate with regard to the issue of waiver. Although petitioners argue that the Second Circuit's decision misconstrues the mandate in *Meacham* on the issue of waiver, this is not the case.

Courts have long-recognized under the mandate rule that a lower court is bound to follow whatever was previously disposed of by this Court. Indeed, in *In re*

Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895), this Court explained the mandate rule as follows:

> whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose other than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Id. at 255 (citing *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 489 (1838)).

In other words, as recognized by the Second Circuit in the Summary Order, the mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided" by that court. *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (emphasis in original)). Likewise, "where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Ben Zvi*, 242 F.3d at 95.

The mandate rule has been consistently and strictly followed. *See, e.g., Escalera v. Coombe*, 852 F.2d 45, 47 (2d Cir. 1988)("Any reconsideration at this juncture of our earlier opinion must be limited to the scope of the Supreme Court's remand."); *Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992); *Hyatt v. Heckler*, 807 F.2d 376, 381 (4th Cir. 1986) (refusing to reach an issue outside of the scope of remand), *cert. denied*, 484 U.S. 820 (1987); *Aladdin's Castle, Inc. v. Mesquite*, 713 F.2d 137, 138 (5th Cir. 1983) (vacating a prior decision that went outside of the scope of Supreme Court remand).

Here, this Court's opinion and the spirit of the mandate cannot reasonably be construed to authorize or warrant a reconsideration of the issue of waiver of the RFOA defense. *See Ben Zvi*, 242 F.3d at 95 (holding that "[t]o determine whether an issue remains open for reconsideration on remand, the . . . court should look to both the specific dictates of the remand order as well as the broader `spirit of the mandate'") (internal citations omitted). *See also Federal Trade Com. v. Standard Education Soc.*, 148 F.2d 931, 932 (2d Cir. 1945) ("Indeed, we must always look to the opinion to interpret the mandate").

The sole issue on which this Court granted certiorari in *Meacham* was whether the RFOA exception to liability contained in Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(4)(f)(1), is an affirmative defense on which the employer bears not only the burden of production, but also the burden of persuasion. As previously noted, in resolving this question, this Court explained, in no uncertain terms, that the only issue at stake in this case

is "the gap between production and persuasion." *Meacham*, 128 S. Ct. at 2406-07.

Thus, the only issue which the Second Circuit was asked to consider on remand was and is "[w]hether the outcome [reached in *Meacham II*] should be any different when the burden [of persuasion on the RFOA defense] is properly placed on the employer." *Id.* And, as this Court also explained, the majority in *Meacham II* "showed no hesitation in finding that [Knolls] prevailed on the RFOA defense, though the court expressed its conclusion in terms of [petitioners'] failure to meet the burden of persuasion." *Id.*

This Court remanded the case "for further proceedings consistent with this opinion" solely to determine this limited issue in the first instance. *Id.* at 2407. By necessary implication, this Court did not leave open the issue of waiver for reconsideration.

This conclusion is supported by the fact that petitioners had previously raised the issue of waiver or forfeiture before this Court both in their Brief and during oral argument.

In fact, while petitioners' counsel acknowledged that Knolls had pled the RFOA defense in its Answer and had shown it had a "business justification" for its actions at trial, counsel argued to this Court that Knolls had waived the RFOA defense by not raising the issue specifically to the jury and that, because it was an affirmative defense, such failure constituted a waiver. (JA-5150-5151).

In both their responding Brief and at oral argument, Knolls countered that there was no waiver or forfeiture of the RFOA defense and that the judgment below should be affirmed because, even if the employer bears the burden of persuasion on the RFOA defense, the proof at trial established the viability of their RFOA defense as a matter of law. (JA-5138-5143).

In support of this position, Knolls demonstrated that the overwhelming and unrebutted evidence produced at trial established that petitioners were laid off not because of their ages, but because of Knolls' evaluations of petitioners' performance, company service, flexibility and criticality. Indeed, the jury verdict completely exonerated Knolls from all liability on petitioners' claims of intentional age discrimination, conclusively establishing that petitioners were not terminated because of their ages. Knolls also pointed to evidence, including, but not limited to, the expert testimony of Dr. Landy, proving that these four criteria were indeed reasonable factors to use in selecting employees for layoff. (*Id.*).

Knolls also advised this Court that petitioners failed to counter this evidence of reasonableness and did not directly challenge the testimony of Knolls principals regarding the planning and execution of the RIF. (JA-5146-5147). Moreover, Knolls pointed out that the majority of the panel in *Meacham II* expressly found that "defendants have not waived the argument that their business justification was 'reasonable.'" *Meacham II*, 461 F.3d at 146 n.9. (JA-5146 5147).

This Court did not disturb the Second Circuit's finding on waiver or its determination that Knolls met its burden of production on the RFOA defense (although the Second Circuit stated it in terms of petitioners' failure to meet their burden of persuasion).

Because the issue of waiver has already been presented to and impliedly rejected by this Court, the Second Circuit's decision interpreting the mandate to preclude reconsideration of this issue was correct.

Petitioners' cases do not dictate a contrary result, and in fact, support Knolls' position. In *United States v. Navajo Nation*, ___ U.S. ___, 129 S. Ct. 1547 (2009), for example, this Court reversed the decision of the Court of Appeals because the Court found that its reasoning in its earlier decision, "left no room" for the result reached by the Court of Appeals based upon the sources that court had relied upon. Similarly, this Court recognized in *Meacham* that Knolls had already met its burden of production on its RFOA defense, and identified the only remaining issue was whether Knolls' burden of proof was also met. This identification of the issue to be decided on remand left no room for the District Court's erroneous finding of waiver.

Likewise, in *Alleghany Corp. v. Breswick & Co.* ("*Breswick*"), 355 U.S. 415 (1958), this Court reversed a court of appeals decision which went beyond the scope of the opinion and mandate in that case. Rather than supporting the grant of the petition in this case, the Court's decision in *Breswick* actually supports the Second Circuit's refusal to go beyond the scope of the opinion and mandate handed down by this Court on the issue of waiver.

Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904), is also clearly distinguishable. In that case, unlike this one, the judgment was rendered on the pleadings, which were pleadings that were amended following the remand to the lower court. Accordingly, as the Supreme Court held, the mandate rule did not foreclose the court from reviewing questions that had not already been decided.

Quern v. Jordan, 440 U.S. 332 (1979) is also of no assistance to petitioners. In that case, this Court had considered only the constitutionality of certain relief before it. Thus, this Court noted (in a footnote) that the law of the case doctrine did not preclude a court on remand from considering the propriety of notice relief because such relief was not inconsistent with either the spirit or express terms of the Supreme Court's prior decision. Here, as discussed above, reconsideration of the waiver question would be inconsistent with both the spirit of the mandate and the express terms of this Court's decision and would frustrate the Court's purpose in remanding the matter.

Petitioners' reliance upon *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) is also misplaced. In that case, the issue decided by this Court was sufficiently different from the one presented on the second petition such that it was not covered by the former mandate or decree. In this case, petitioners vigorously advanced the precise question of waiver before this Court and were rebuffed. By necessary implication, reconsideration of the issue was foreclosed on remand to the Second Circuit.

POINT II

KNOLLS DID NOT WAIVE OR ABANDON THEIR RFOA DEFENSE

Even assuming that the issue of waiver somehow remained open for consideration on remand, the petition for certiorari on the question presented by petitioners should be denied. As discussed below:

(i) Knolls never intentionally relinquished a known right to assert the RFOA affirmative defense because they were acting in accordance with existing case law at the time of trial;

(ii) the District Court improperly elevated form over substance when it found that Knolls had waived the RFOA defense by not using the precise terms "reasonable factors other than age" or "RFOA," which the District Court characterized as being "terms of art;" and

(iii) the District Court improperly overlooked the substance of the proof produced by Knolls, which production was plainly sufficient to place petitioners on notice that Knolls' defense was based upon proof that petitioners were selected for layoff based on reasonable, appropriate, job-related, and legitimate criteria (*i.e.*, reasonable factors other than age).

A. Knolls Acted in Accordance with Existing Legal Precedent

As has been long recognized by this Court, a waiver is the intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A party cannot be deemed to have waived objections or defenses which were not known to be available at the time they first could have been made, especially when the party raises the objections as soon as their cognizability is made apparent. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (noting that "the mere failure to interpose a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground"), *cert. denied*, 391 U.S. 966 (1968); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941) (permitting Commissioner of Internal Revenue to rely on a statutory provision not previously relied upon because of an intervening Supreme Court decision); *Uebersee Finanz-Korporation, A. G. v. McGrath*, 343 U.S. 205, 213 (1952); *Holzsager v. Valley Hospital*, 646 F.2d 792, 796 (2d Cir. 1981) (refusing to find that defendant had waived its affirmative defense where the Supreme Court had handed down an intervening new decision indicating that the defense existed and defendant thereafter promptly raised it).

Here, during the pre trial stages of the litigation and throughout the trial, this Court had never held that a disparate impact claim was even available under the ADEA, nor had it set forth the applicable evidentiary burdens of proof required to prove and defend against such a claim. Moreover, at the time of trial, the Second Circuit had never held that RFOA was an affirmative

defense as to which the employer had the burden of proof. Cases in the Second Circuit had also held that an employer's RFOA burden was merely a burden of producing evidence of legitimate nondiscriminatory reasons for its actions. *See, e.g., Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992)

As a result, when Knolls filed its summary judgment motion and when this case was tried, the parties and the lower court were operating under the then applicable, long-standing Second Circuit precedent on these issues. *See Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

At that time, the Second Circuit had held that a disparate impact claim was available and that this Court's analysis in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *cert. denied*, 513 U.S. 809 (1994). and *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988) applied. *See e.g., Smith v. Xerox Corp.*, 196 F.3d at 365; *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir. 1992); *Geller v. Markham*, 635 F.2d at 1032. Under the *Wards Cove* burden-shifting analysis, an employer could defend disparate impact claims only "by showing that the employment practice is justified by business necessity or need and is related to the successful performance of the job for which the practice is used."

And, as Justice Scalia observed in his concurrence, at that time, the "reasonableness" and "business necessity" standards were considered "identical." *Meacham*, 128 S. Ct. at 2407 (citing 29 C.F.R. § 1625.7(d)

and observing that the applicable EEOC regulations in effect at the time required an employer who intended to rely on the RFOA defense to establish "business necessity.").

Thus, Knolls had every reason to believe that its burden (whether on motions or at trial) was merely one of production and that, to rebut petitioners' prima facie case, it had to show that a business justification or "business necessity" for the challenged actions existed. Knolls offered substantial evidence to show that there was a business justification for each aspect of the RIF process, including the four criteria used for rating employees on a matrix, and Knolls consistently argued that such proof was sufficient to meet or exceed what the parties and the District Court then believed to be Knolls' burden of production.

We now know from *City of Jackson* and the Supreme Court's opinion in this case that the Second Circuit decisions in *Smith*, *Geller* and *Maresco* were wrongly decided on the evidentiary burden of proof issues in disparate impact ADEA cases.

As this Court explained in *City of Jackson* and in this case, the scope of liability for disparate impact claims under the ADEA is narrower than under Title VII and employers can defeat such claims by showing that they relied upon "reasonable factors other than age" in the decision-making process. This Court also explained for the first time in *City of Jackson* that, unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact, "the reasonableness inquiry

includes no such requirement." *City of Jackson*, 544 U.S. at 242.

Petitioners themselves conceded in their Petition for Rehearing to the Second Circuit that *City of Jackson* represents a "significant," "groundbreaking" and "dramatic" change in law, "overturning 26 years of Second Circuit precedent." (JA-4977, 4988).

It is well-established that a defendant is not required to predict changes in the law to avoid waiving its right to assert an affirmative defense, and "clairvoyance" by a defendant "is inconsistent with the doctrine of waiver." *Holzsager*, 646 F.2d at 796. *See also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that, in light of its decision announcing changes in the law, the employer "should have an opportunity to assert and prove the affirmative defense to liability"); *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 586 (9th Cir. 2000) (considering new affirmative defense issue raised for the first time on appeal after a trial due to a change in the law by the Supreme Court while the case was pending). *Cf. United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) (holding that a "defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority" and, when "a supervening [Supreme Court] decision alters settled law," a defendant "cannot be said to have 'forfeited a right' by not making an objection, since at the time of trial no legal right existed").

Although petitioners now contend that Knolls somehow intentionally waived reliance on RFOA as an affirmative defense by not using that precise

terminology at trial, petitioners conceded, in their Brief on Remand that Knolls' proposed jury instructions and the instructions given by the trial judge were proper and consistent with settled precedents at the time of trial. (SPA-4988).

In any event, Knolls not only included a specific RFOA defense in their Answer, but they also raised the RFOA affirmative defense, in those precise terms, at the first practically possible time following the Supreme Court's initial remand of this case in light of *City of Jackson*, and immediately after the EEOC's injection of the affirmative defense issue into this case, without any unfair prejudice to petitioners.

Under all of these circumstances, a finding of waiver or forfeiture is unwarranted. *Curtis Publ'g Co. 388 U.S. at 143; Helvering*, 312 U.S. at 556-57; *Rogers v. McDorman*, 521 F.3d 381 (5th Cir. 2008)(finding no waiver even though defendants did not use the precise legal term "in pari delicto" to describe their affirmative defense because it placed plaintiffs on notice of that defense by describing certain specified conduct engaged in by plaintiffs); *Donovan v. Milk Mktg., Inc.*, 243 F.3d 584, 586 (2d Cir. 2001), citing with approval, *Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1184-85 (11th Cir. 1999)(holding that an employer does not waive a "mixed motive" affirmative defense by failing to include it in its answer so long as plaintiff is apprised of the substance of the defendant's argument before close of proof). *See Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386, 2009 U.S. Dist. LEXIS 14883 (S.D.N.Y. Feb. 23, 2009)(citing *Rose v. Amsouth Bank*, 391 F.3d 63, 65 (2d Cir. 2004)).

B. The Court Improperly Elevated Form Over Substance

There is another related and compelling reason why this Court should not grant the petition to review the issue of waiver. In reaching its conclusion that Knolls had waived its RFOA defense, the District Court erroneously relied on the fact that Knolls never used what it referred to as a "term of art," that is, the term RFOA or the precise phrase: "reasonable factors other than age." *Meacham v. Knolls Atomic Power Lab.*, 627 F. Supp. 2d at 72.

In penalizing Knolls for not using these magic words, the District Court improperly elevated form over substance. While Knolls used terms like "legitimate business reasons," "legitimate non-discriminatory reasons other than age" and "business justification" and other similar phrases, the use of such terminology itself does not evince an intent to waive the RFOA defense. *See Rogers v. McDorman*, 521 F.3d 381. *Accord United States v. Pineiro*, 470 F.3d 200, 204 (5th Cir. 2006)("We have never required a party to express its objection in minute detail or ultra-precise terms)."

Indeed, as Justice Scalia explained in his concurrence in *Meacham*, prior to *City of Jackson* the "reasonableness" and "business necessity" standards were considered "identical"; thus using one term necessarily included the other term. *Meacham*, 128 S. Ct. at 2407 (citing 29 C.F.R. § 1625.7(d) and observing that the applicable EEOC regulations in effect at the time required an employer who intended to rely on the RFOA defense to establish "business necessity").

Similarly, as explained by Justice O'Connor in *City of Jackson*, the phrase "legitimate non-discriminatory reasons" was, at that time, considered to be both "analogous" to, and the functional equivalent of, reasonable factors other than age. *City of Jackson*, 544 U.S. at 252 (O'Connor, J., concurring).

Again, the American Heritage dictionary defines the word "legitimate" — which Knolls repeatedly used to describe its actions and the layoff criteria — as being, among other things, "based on logical reasoning; reasonable." The American Heritage Dictionary, 4th Ed. 2000, Houghton Miffin Company. Similarly, the Cambridge Advanced Learner's Dictionary defines "legitimate" as "reasonable and acceptable." The Cambridge Advanced Learner's Dictionary, 3d Ed. 2008, Cambridge University Press.

Consequently, contrary to what the District Court found, the use by Knolls of such terms as "business justification" or "legitimate non-discriminatory reasons other than age" to describe their defense to petitioners' disparate impact claims throughout the trial is not evidence of an intentional waiver by Knolls of their "reasonableness" defense and should not have been construed as such by the Magistrate. In fact, just the opposite is true.

C. The Court Erroneously Overlooked the Substance of the Proof Offered at Trial

Before concluding that Knolls waived the RFOA defense, the District Court was required to, but did not, look beyond the words used by Knolls to examine the substance of the proof they submitted to determine

whether that substance was sufficient to place petitioners on notice that the RFOA exemption was in the picture. *See Rogers v. McDorman*, 521 F.3d at 381. See *also Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971) (noting that the purpose of pleading affirmative defenses "is to give the opposing party notice of the [defense] and a chance to argue, if he can, why the [defense] would be inappropriate").

The Magistrate erroneously failed to consider the substance of the evidence offered by Knolls on the reasonableness of the RIF process as well as the four matrix criteria used to select employees for the RIF. The Magistrate also overlooked the fact that petitioners have repeatedly conceded the reasonableness or legitimacy of the matrix criteria themselves for determining which employees had the critical skills needed to fully support the Naval Reactors Program and fulfill future business needs.

The substance of Knolls' RFOA defense, however, required no speculation on the part of petitioners. In fact, Knolls offered the same proof in defense of petitioners' disparate treatment claims. Petitioners were thus well aware, from the time Knolls filed an Answer and throughout the trial, that Knolls maintained these components of the RIF were reasonable, job-related and legitimate non-age factors.

In fact, Knolls filed a pre-trial motion for summary judgment in which they contended, among other things, that even if petitioners could establish a prima facie case, they were unable to satisfy their burden of demonstrating that Knolls' "legitimate business

objectives . . . could have been achieved by reasonable means other than those that were employed." Similarly, Knolls contended in its Trial Memorandum that it had "business justifications" for the RIF and that the "RIF selection criteria were plainly job related." (JA-510). Knolls also argued the legitimacy and reasonableness of the non-age selection criteria used by Knolls in summation to the jury. *(See,* JA-4403-4411).

Although the District Court overlooked Knolls' summation to the jury, Knolls argued to the jury that there were legitimate non-discriminatory reasons having to do with criticality, flexibility, company service and performance that account for the layoff and that these criteria were legitimate factors on which to rank everybody and that Knolls used extreme care in developing this system in order to select only those people who were lowest, in terms of their criticality, flexibility, company service and performance. (JA- 4410-4412, 4418).

The Magistrate also overlooked his own instructions given to the jury that: (a) "[e]mployers generally possess the right to terminate the employment of employees involuntarily for many reasons," but not due to age (JA-610--611); (b) plaintiffs alleged in their disparate impact case "that the practices by which they were selected for termination . . . , while fair on their face, were discriminatory in operation" (JA-616-617); and (c) *"[t]he defendants asserted] that factors other than the ages of the plaintiffs . . . accounted] for any statistical deviations . . . [and] [t]hese factors include . . . the education, work performance, skills, flexibility and criticality of the plaintiffs as compared to other similarly situated employees"* (JA-619)(emphasis added).

Under all these circumstances, the District Court erred in concluding that Knolls "fail[ed] to press the RFOA defense in words reasonably understood as asserting that defense."

Because Knolls continued to rely on the substance of the RFOA defense before, during, and after trial, it defies common sense for the District Court to conclude that Knolls' overwhelming proof and arguments showing that there were business justifications for the challenged actions and that the selection criteria were reasonable, legitimate and job-related did not suffice to place plaintiffs on notice of the RFOA defense.

D. The Lower Court Mischaracterized Knolls' Evidence

The Magistrate's decision on the waiver issue was clearly erroneous for yet another reason. The District Court mischaracterized Knolls' "business necessity" defense as being offered solely to prove Knolls' budgetary need to reduce its workforce while still retaining employees with skills critical to the performance of Knolls' functions and not the reasonableness of the selection criteria itself.

While Knolls admittedly offered abundant and unimpeached evidence of the business need to reduce its workforce and to retain people with critical skills, such proof was necessary, among other things, to counter petitioners' contentions that there was no need for a RIF at all and that Knolls could instead have simply instituted a broader voluntary separation plan or implemented a hiring freeze to reduce its workforce.

As noted earlier, the very same proof - *i.e.*, the reasons for selecting each of the plaintiffs for layoff – was also introduced to counter petitioners' intentional discrimination claims. Knolls' evidence of the need to conduct a RIF and retain people with critical skills, however, was not offered to the exclusion of other evidence to support its RFOA defense to petitioners' disparate impact claims. (*See* discussion above).

The cases cited by petitioners in support of their waiver argument actually undermine their position. Indeed, the majority of these cases all dictate that a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they first could have been made, especially when the party raises the objections as soon as their cognizability is made apparent. *See Curtis Publ'g Co. v. Butts*, 388 U.S. at 143 (noting that "the mere failure to interpose a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground"); *Holzsager v. Valley Hospital*, 646 F.2d at 796 (2d Cir. 1981) (refusing to find that the defendant had waived its affirmative defense that the court lacked jurisdiction where the Supreme Court had handed down an intervening new decision indicating that the defense existed and the defendant thereafter promptly raised it); *Bennett v. City of Holyoke*, 362 F.3d 1 (1st Cir. 2004) (recognizing an exception to the raise-or-waive rule where objection or defenses were not known to be available, but finding waiver as to a particular claim where defense was pressed only for another claim);*Federal Election Commission v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir.)(new rule of law excuses failure to plead a defense);

Holland v. Big River Minerals Corp., 181 F.3d 597 (4th Cir. 1999) (failure to timely pursue an issue does not constitute waiver when there has been an intervening change in the law recognizing an issue that was not previously available), *cert. denied*, 528 U.S. 1117 (2000); *Reed v. Ross*, 468 U.S. 1 (1984) (declining to find waiver where defendant failed to initially raise issue on appeal, but subsequently raised the issue, where the state of the law at the time of appeal did not offer a reasonable basis upon which to challenge the issue subsequently raised); *Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 447 n.4 (2d Cir. 2006) (holding that a defendant "should not be penalized for omitting an affirmative defense it did not know it had at the time").

This Court should also reject petitioners' contention, that this Court's decision in *Unitherm v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), precludes the Second Circuit from considering the very issue presented to it by this Court on remand. In *Unitherm*, this Court held that an appellate court could not rule on the sufficiency of the evidence necessary to sustain a jury verdict unless a defendant had filed a Rule 50(b) motion for JMOL following a trial, which the defendant in that case had not done. *Unitherm*, 546 U.S at 404. In contrast here, Knolls did file a timely and legally sufficient Rule 50(b) motion following the trial. Hence *Unitherm* simply does not apply.

Unitherm is also distinguishable from this case for yet another very important reason: unlike *Unitherm*, this Court expressly remanded this case to determine "in the first instance" whether Knolls' proof at trial on reasonableness filled the gap between its prior burden

of production under *Wards Cove* and its newly-established burden of persuasion. Thus, rather than being precluded from considering the sufficiency of the evidence offered at trial, as the court was in *Unitherm*, the Second Circuit was required (but failed) to comply with directions given by this Court in its remand order and reconsider the sufficiency of the proof offered by Knolls on the issue of reasonableness with respect to the factors at issue here.

The remaining cases cited by petitioners are also inapposite. *See Ohler v. United States*, 529 U.S. 753 (criminal defendant waived his objection to the state's introduction of defendant's prior conviction where the defendant introduced the same evidence himself); *United States v. Broce*, 488 U.S. 563 (1989) (court declined to set aside a voluntary guilty plea where defendant knowingly and intentionally waived his right to jury).

POINT III

ANY PURPORTED WAIVER SHOULD HAVE BEEN EXCUSED

Even assuming that Knolls somehow waived the RFOA defense, Knolls acted in accordance with, and in reliance upon, over twenty years of settled Second Circuit precedent for which it should not now be penalized. *See* discussion at Point II(A). This conclusion is supported by the Second Circuit's decision in *Millowitz v. Citigroup Global Markets, Inc. (In re Salomon Analyst Metromedia Litig.)*, cited in Second Circuit's Summary Order remanding this case back to the District Court. Thus, any waiver should have been excused by the District Court.

CONCLUSION

For all of the forgoing reasons, the Petition for Certiorari should be denied in its entirety.

Respectfully submitted,

MARGARET A. CLEMENS
Counsel of Record
LITTLER MENDELSON, P.C.
400 Linden Oaks
Suite 110
Rochester, NY 14625
mclemens@littler.com
(585) 203-3400

JOHN E. HIGGINS
NIXON PEABODY LLP
677 Broadway, 10th Floor
Albany, NY 12207
jehiggins@nixonpeabody.com
(518) 427-2650

Counsel for Respondents